

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
FOR DIVISION ONE

<u>Morris Talaga</u> ,)	Case No. <u>71447-3-I</u>
Petitioner,)	
)	
VS.)	STATEMENT OF ADDITIONAL
)	GROUNDS, PURSUANT TO
<u>State of Washington</u> ,)	RAP 10.10
Respondent,)	
)	
)	

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I, Morris Talaga , have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in the brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

TALAGA WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO NOTICE OF CHARGES AND WAS CONVICTED OF AN UNCHARGED OFFENSE.

Talaga seeks reversal of his conviction or resentencing upon the lesser included because the prosecutor failed to charge Talaga as an accomplice to assault but instructed the jury on Accomplice Liability over defense objections for reasons argued below that was reversible error.

A. Relevant Facts

The state charged Talaga with one count of Assault in the First Degree, upon Allen Montrae Gordon. See Amended Information, at CP13-14.

The state proposed an Accomplice Liability Instruction and the trial court allowed this instruction to the jury, over defense objections. Defense counsel specifically argued that it would be error to give the accomplice liability instruction. 11-25-13 RP13 1. However the instruction was provided to the jury in the court's instructions and this error is now before this Court of Appeals. See Accomplice Liability Instruction at CP 36.

During closing arguments, the prosecutor relied on the uncharged accomplice liability instruction, to convict Talaga of Assault in the first degree.

" Lets say for the sake of argument male 1 knocked down Mr. Gooden, Mr. Gooden fell to the pavement, hit his head on the hard cement, and that's what caused the hemorrhage to the brain. It doesn't matter. That doesn't let the defendant off the hook because he is an accomplice to that action. And how do we know that? Well, first of all, contrary to the defendant's testimony, we have a pretty good inference drawn from the video that the defendant is associated and probably friends with males 1 and 2."

"Males 1 and 2 get out of the car, head straight over to where the defendant is standing. Presumably there is something going on between the two crowds of people. What happens next? The defendant starts to back off, starts to move over. Mr. McCraney comes in front of him. While that's happening, this male No.1 comes right behind Mr. Gooden. Its at that point Mr. Gooden goes down. We don't see the blow, but presumably knocked down by male one. Then what does 1 do? He stands over Mr. Gooden. How long does he stand there? Just long enough for the defendant to come over and start beating him. 11-26-13 Rp 14-16.

B. Argument

An accused has a constitutional right to be informed of the charges he will face at trial. Wash. Const. Art.1, Sec.22, U.S. Const. amend. 6.

The 6th Amendment requires in part that an information state the elements of a offense charged with sufficient clarity to apprise a defendant of what he must be prepared to defend against. Russell V. United States, 369 U.S. 749 (1962); Miller V. Stagner, 768 F.2d 1090 (9thCir. 1985).

A charging document is adequate only if it includes all essential elements of a crime - - statutory and non statutory - - so as to inform the defendant of the charges and to allow the defendant to prepare a defense. State V. Vangerpen, 125 Wn,2d 782, 888 p.2d 1177 (1995). As interpreted by the Washington Supreme Court, the state and federal constitutions guarantee criminal defendants the right to be apprised with reasonable certainty of the nature of the charges against that person in order to prepare an adequate defense. State V. Elliot, 114 Wn.2d 6 (1990). The essential purpose of this guaranty is to provide notice. State V. Bailey, 114 Wn.2d 340 (1990).

Talaga submits that his rights to notice of charges and rights to prepare a defense were violated by the state's failure to charge Talaga as an accomplice in its charging information. The essential elements of being an accomplice, to any assault, are not included in the Amended Information.

Because the state failed to charge Talaga as an accomplice and later included an Accomplice Liability instruction to the jury over defense objections, Talaga is entitled to a new trial.

When a jury is instructed on an uncharged crime, a new trial is appropriate when it is possible that the defendant was mistakenly convicted of an uncharged crime. Sate V. Brown, 45 Wn.APP. 571,726 P.2d 60 (1986)(Div.One).

It is error to instruct the jury on alternative means that are not contained in the charging document. Sate V. Chino, 117 Wn.APP 531, 72 P3d 256 (2003). This error may be harmless if other instructions clearly limit the crime to the charged alternative. Chino, 117 Wn.APP at 540.

Although Accomplice Liability is not an alternative means crime per se, however the prosecutor inserted this additional element of First Degree Assault but failed to charge it in its charging information. Moreover the prosecutor in closing arguments urged the jury

to consider convicting Talaga as an accomplice for uncharged acts of other participants, that were outside of the club fighting.

Consequently the error cannot be harmless because it remains possible the jury convicted Talaga of uncharged crimes under accomplice liability. Chino, 117 Wn.App. at 540 - 41. See also State V. Brewczynski, 173 Wn.App 541.294 P.3d 835 (2013)(Trial Courts error in including uncharged alternative in the first degree burglary instruction was not harmless).

In State V. Haack, 88 Wn.APP. 423, 958 P.2d 1001 (1997) (Div.One) the trial court instructed the jury that to convict the defendant, it must find that "the defendant or an accomplice assaulted the victim and that the defendant or an accomplice acted with intent to inflict great bodily harm. The defendant argued that this instruction allowed the jury to convict by splitting the elements of the crime between himself and his brother.

This Division One Court of appeals agreed but held that the instructions were not an in correct statement of accomplice liability law. Haack, 88Wn.App. at 427.

The Court stated that the jury could convict all the participants in a first degree assault if the state proved that a life threatening injury was caused by one of the participants and that at least one of the participants intended to inflict life threatening harm, the state did not have to prove which participant actually inflicted the injury. Haack, 88 Wn.APP. at 428.

In State V. Walker , 178 Wn.App. 478, 315 P.3d 478 (2013) the Division Two Court of Appeals hold that a conviction for first degree premeditated murder could be based on a finding that an accomplice , rather than defendant, had premeditated intent to kill victim.

In Haack, supra and Walker, supra, both were charged under the Accomplice Liability Statute, RCW 9A.08.020, as principal or participant to the substantive charges of Murder and Assault.

In the case at bar, Talaga was not charged and provided notice that he would be tried as an accomplice.

This violated Talaga's 5th, 6th and 14th Amendment Rights to notice, Rights to Present a Defense, and Due Process of Law requiring a new trial. U.S. Constitution.

Additionally because the State did not include the Accomplice element in its To Convict Instruction, for Assault in the First Degree, the state was relieved of its burden to prove every element of the crime. See To Convict Instruction, No.11, at CP 42.

The Accomplice Instruction served as an extra element to the Assault charge and because the Accomplice element was not included

in the To Convict Instruction, the State was relieved of its burden of proof, in violation of the Fourteenth Amendment of the U.S. Constitution and In Re Winship, 397 U.S. 358 (1970).

These compound errors require reversal of Talaga's Assault conviction.

Additional Ground 2

THE JURY INSTRUCTION FAILED TO REQUIRE UNANIMITY AS TO WHAT ACT CONSTITUTED THE FIRST DEGREE ASSAULT.

The Federal Constitutional right to trial by jury and the State Constitutional right to conviction only upon unanimous jury verdict require jury unanimity on all essential elements of the crime charged. U.S. Const. amend. VI; Wash. Const. art. 1, Sec. 21; State V. Camarillo, 115 Wn.2d 60 (1990); State V. Kitchen, 110 Wn.2d 403 (1988).

When evidence indicates several distinct acts, any one which could form the basis for a conviction, either the State must elect which act it is relying on as the basis for the charge, or the court must instruct the jury it must unanimously agree that the same act has been proved beyond a reasonable doubt. State V. Coleman, 159 Wn.2d 509 (2007); State V. Petrich, 101 Wn.2d 566 (1984); Camarillo, 115 Wn.2d at 64.

Failure to follow either alternative is an error of constitutional magnitude due to the possibility some jurors may have relied on one act while other jurors relied on another, in violation of a defendant's right to a unanimous jury. Coleman, 159 Wn.2d at 511-12, State V. Bobenhouse, 166 Wn.2d 881 (2009), 2.5 A

Here the State presented distinct acts that the jury could convict under. Those that consisted of Talaga's claim of Self defense - Assault, upon Mr. Gooden, and those that consisted of acts by other individuals in the fight, the State portrayed as Accomplices, to 11-26-13 RP 14-16.

Yet the jury was given no guidance regarding which act to consider or which act the State was relying upon for a conviction. Because there was no statement of unanimity or an instruction informing the jury of its duty to unanimously agree on the same act, Talaga's conviction must be reversed.

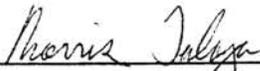
Prejudice is presumed in a multiple acts case where there is neither an election or unanimity instruction. Coleman, 159 Wn.2d at 510. The presumption is overcome and the instructional error harmless only if no rational trier of fact could have a reasonable doubt as to whether the evidence of each act established the offense. Chapman V. California, 386 U.S. 18 (1967); Camarillo, 115 Wn.2d at 65.

The error was not harmless here and the remedy Talaga seeks is a just and equitable remedy to be granted a new trial resentenced upon Assault in the Second Degree a lesser of Assault in the First Degree. See Assault Two lesser at CP 47, Jury Instruction No. 15.

Conclusion

Talaga's Assault charge, stems from a bar fight that escalated to a parking lot. The prosecutor argued the jury could convict based on uncharged Accomplice acts and the trial court did not provide a unanimity instruction, to elect which act the prosecutor relied upon to convict. Talaga seeks a new trial or resentencing for Assault in the Second Degree because the jury could find Assault Two absent other acts by uncharged Accomplices. This is a just and equitable remedy.

Respectfully Requested and
Dated This 25 Day of November 2014.



Morris Talaga Pro Se

1) Talaga submits that the 404 (b) error raised by his Appellate Counsel, denied him a fair trial under the 14th Amendment Due Process Clause of the U.S Const...

DECLARATION OF SERVICE BY MAIL
CR 3.1(c)

I, MORRIS TALAGA, declare that, on
this day of NOVEMBER, 20 14 I deposited the forgoing documents:

STATEMENT OF Additional Grounds

or a copy thereof, in the internal legal mail system of STAFFORD CREEK
CORRECTIONAL CENTER

And made arrangements for postage, addressed to: (name & address of court or other party.)

CLERK OF DIV. I CT. OF APPEALS -
ONE UNION SQUARE 600 UNIVERSITY
ST., SEATTLE, WA. 98101;
KING COUNTY PROSECUTOR / APPELLATE UNIT
W554 KING CNTY COURTHOUSE
516 3rd Ave
SEATTLE, WA. 98104

I declare under penalty of perjury under the laws of the State of Washington that the
foregoing is true and correct.

Dated at Aberdeen WA on 11-25-14
(City & State.) (Date)

Morris Talaga
Signature

MORRIS TALAGA
Type / Print Name